In the
Supreme Court of the United States
October Term, 1945

No.

MILTON ROE SABIN and BERTHA FLORENCE SABIN,

Petitioners,

VERSUS

HOME OWNERS' LOAN CORPORATION, a Corporation; O. K. WETZEL; P. L. MURPHY; A. GARLAND MARRS, Sheriff of Tulsa County, Oklahoma; W. S. DUGGINS, NATE MARTIN, JOHN BURNETT and TOM KITHCART, Deputy Sheriffs of Tulsa County, Oklahoma; CAL CRUM, Clerk of the District Court of Tulsa County, Oklahoma; and JOE HODGES, doing business under the name and style of JOE HODGES TRANSFER AND STORAGE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS

The opinion of the Supreme Court of the State of Oklahoma in the foreclosure case leading up to this case (by

Justice Riley, concurred in by Justices Bayless, Osborn, Hurst and Davison) is reported in 187 Okla. 504, 105 Pac. (2d) 245.

No opinion was rendered by the United States District Court.

The opinion of the Circuit Court of Appeals for the Tenth Circuit (Circuit Judges Phillips, Bratton, and Murrah, written by Judge Bratton) was rendered February 21, 1945, and is found at Page 399 of the record, and is reported in 147 Fed. (2d) 653.

JURISDICTION

Jurisdiction of this Court to grant *certiorari* is invoked under Title 28, Section 347(a), U. S. C. A. (Jud. Code #240, as amended), and is shown in the petition at page 6.

STATEMENT OF THE CASE

The facts have also been sufficiently set out in the petition at page 2. Particular attention is called to the fact that the sheriff's deed (R. 132, 351), was executed and delivered at a time when execution was stayed by order of the Court (R. 132, 349, Appendix I); also, to the fact that the alias writ of assistance (R. 157, 376) was executed at a time when the Supreme Court of Oklahoma had permitted to be filed and had under consideration a petition to recall mandate and grant a rehearing (R. 134, 356).

SPECIFICATION OF ERRORS

I.

The sheriff's deed was and is void, because issued at a time when execution was stayed, and the Circuit Court of Appeals was in error in failing to hold that petitioners have been denied due process of law by having been evicted under an alias writ of assistance issued to put the H. O. L. C. in possession under such void sheriff's deed.

II.

The alias writ of assistance is further void because it was executed at a time when the Supreme Court of Oklahoma had re-assumed and had exclusive jurisdiction of the case, and the Circuit Court of Appeals was in error in failing to hold that petitioners have been denied due process of law by being evicted under such writ.

ARGUMENT

I.

The Sheriff's Deed Was Void

The applicable statutes of the State of Oklahoma at the time of the foreclosure proceedings, sale and the issuance of the sheriff's deed, were the Oklahoma Statutes of 1931.

Section 456 of these statutes (Appendix III) provides that, among other necessary steps in the enforcement of a judgment by "execution," there must be a confirmation of the sale by the court.

This required order of confirmation is an appealable order, i. e., a final judgment from which an appeal may be taken.

—*Vann* v. *Union Central Life Ins. Co.*, 79 Okla. 17, 191 Pac. 175;
Morrison v. *Burnett*, 154 Fed. 617;
Dakota Investment Co. v. *Sullivan*, 9 N. D. 303, 81 Am. St. Rep. 584;
Wauchope v. *McCirmick*, 158 Mo. 660, 59 S. W. 970;
State Nat. Bank v. *Neel* (Ark), 122 Am. St. Rep. 185;
Hammond v. *Cailleand*, 111 Cal. 206, 52 Am. St. Rep. 167;
Koehler v. *Ball*, 2 Kan. 160, 83 Am. Dec. 451.

Quoting from *Vann* v. *Union Central Life Ins. Co.*, *supra*, it is therein said:

"* * * an appeal may be prosecuted from the order of confirmation."

In the same section of the statute providing for confirmation of the sale (Okla. Stat. 1931, Section 456, *supra*), it is further provided that upon such confirmation being made there shall be "an order that the officer make to the purchaser a deed."

Section 457, Okla. Stat. 1931 (Appendix III), provides for the necessary recitals of the sheriff's deed, and that it "shall be sufficient evidence of the legality of such sale."

Section 424, *id.*, provides that:

"* * * The court may, in the order confirming a sale of land under order of sale on foreclosure or upon execution, award or order the issuance of a writ of assistance by the clerk of the court to the sheriff * * * to place the purchaser in full possession of such land. * * *"

Section 546, *id.* (Appendix V) provides that at any time when the time for making or completing a case-made for appeal is extended the court or judge "*shall* include in such order an order *staying execution* pending the giving of an undertaking."

All of these things were included in the order of confirmation of sale in this case (Appendix I-III), i.e., (1) the sale was confirmed; (2) the sheriff was directed to make a deed; (3) a writ of assistance was ordered to put the purchaser in possession; (4) notice of appeal was given; (5) the petitioners were given an extension of time to make and serve case-made; and (6) petitioners were given twenty days to file a supersedeas bond.

While the order of confirmation did not specifically order that the execution be stayed during the twenty days allowed to file supersedeas bond, we argued to the Circuit Court of Appeals, and that Court stated in its opinion (R. 404), "with that we are not in disagreement," that the stay was granted even without being in the order by reason of the mandatory requirements of Okla. Stat. 1931, Section 546 (12 Okla. Stat. 1941, Section 971) that whenever the time for making case-made is extended the court *shall* include in such order "staying execution pending the giving of an undertaking," and by reason of the fact that the court did, in fact, allow twenty days to file supersedeas bond.

This section of the statute was construed in *Howe* v. *Farmers & Merchants Bank*, 155 Okla. 284, 8 Pac. (2d) 665, the Court saying:

"* * * In 1905 it was provided that in extending the time for settling and signing of a case-made, the trial court should fix the time within which an undertaking might be given *to become immediately operative and effect a stay* pending the perfecting of the appeal."

The Circuit Court of Appeals states in its opinion (R. 404):

"* * * But no bond was ever given to supersede the order of confirmation. The extended time for the making and completing of the case-made has long since expired. And we understand that no appeal from the order was ever perfected. The contention that the deed is presently void because at the time of its execution and delivery an order was in force and effect staying execution of the judgment is without merit."

Both of the conclusions of fact upon which this conclusion of law is apparently based, are incorrect; for, as a matter of fact, a bond was given to supersede the order of confirmation, and an appeal was perfected from that order.

While the opinion by the Supreme Court of Oklahoma in *Sabin* v. *Home Owners' Loan Corporation, supra*, does not directly say that an appeal from the order of confirmation was perfected, but it is to be noted that in the opinion the Court says:

"* * * After exhaustive hearings the trial court confirmed the sale September 9, 1938. Defendants gave notice of appeal therefrom.

"In the meantime, August 8, 1938, defendants filed an appeal from the judgment of foreclosure.

"In their second proposition for reversal defendants urge the sale was premature because six months had not elapsed since the motion for a new trial was overruled, and that the sale price was grossly inadequate."

And both of these questions were considered and passed on by the Court in its opinion. It is at once apparent that, since the appeal from the original judgment of foreclosure was filed on August 8, 1938, there would have had to be another appeal perfected from the order confirming sale, which was on September 9, 1938, in order for the Court to know that the sale had been confirmed and to pass upon the questions presented upon the confirmation. It has never been contended otherwise by any of the parties. Thus, Mr. Walsh, counsel for the H. O. L. C., stated (R. 97) during the trial, that:

> "* * * The appeal taken to the Supreme Court of Oklahoma was after the sale was made and confirmed."

And Mr. Hudson, counsel for the members of the sheriff's office, stated (R. 158):

> "* * * This appeal was from an order confirming this sale, for which the bond was executed.
>
> THE COURT: Well, there were two appeals.
>
> MR. HUDSON: That's right.
>
> THE COURT: An appeal from the judgment, and later an appeal from the order confirming the sale."

The record also shows conclusively that a bond was eventually given to supersede the order (judgment) of confirmation; not, it is true, for $6,500.00 and not within the twenty days allowed, but within the extended time allowed by the Supreme Court of Oklahoma and in the sum of $2,000.00 as fixed by that Court.

On September 26, 1938, the Supreme Court of Oklahoma made an order (R. 136, 375) that:

> "* * * execution and all further proceedings * * * in the District Court of Tulsa County, Oklahoma, be stayed until further order of this Court."

And, on February 27, 1939, there was filed in and approved by the Clerk of the Supreme Court of Oklahoma, a supersedeas bond in the amount of $2,000.00 (R. 132, 344), which bond was conditioned that:

> "* * * if the judgment be affirmed, they will pay the value of the use and occupation of the property from the date of this obligation until the delivery of possession thereof * * *"

in accordance with the provisions of Section 543, Okla. Stat. 1931 (Appendix IV), providing that when the final order directs the delivery of possession of real property an undertaking to stay execution must be so conditioned.

It is held in *Local Bldg. & Loan Ass'n* v. *Hall*, 145 Okla. 206, 292 Pac. 68, that these are the conditions necessary to be in a supersedeas bond given in an appeal from an order of confirmation of sale of real estate in a mortgage foreclosure proceeding.

We submit, therefore, that, contrary to the conclusion of the Circuit Court of Appeals as to the facts, there was from September 9, 1938, until September 29, 1938, an effective stay by reason of the order contained in the order of confirmation by the District Court of Tulsa County; that from September 26, 1938, such stay was continued in effect by order of the Supreme Court of Oklahoma until February 27, 1939; and that from February 27, 1939, such stay was in effect by reason of the filing and approval of the supersedeas bond, within the time allowed, as extended.

These facts being true, it is submitted that no valid sheriff's deed could have been executed and delivered on the same day as the order of confirmation, September 9, 1938.

The statute (Okla. Stat. 1931, Section 456, *supra*) requires confirmation before a deed may issue. The issuance of the deed is the final step in the execution of the "execution" (or order of sale). But, further execution had been stayed, and was eventually superseded. In other words, the sheriff had proceeded to make a levy under the execution in his hands; he had given notice of sale, and sold the property, and the sale was confirmed. We do not contend that the stay or the supersedeas would undo that which was already done; but that its object and effect were to stay future proceedings.

—*Dulin* v. *Pacific Wood & Coal Co.*, 98 Cal. 306, 33 Pac. 123;
Hey v. *Harding* (Ky.), 78 S. W. 136;
Gardner v. *Continental Ins. Co.* (Ky.), 101 S. W. 911, 912;
Runyon v. *Bennett*, 34 Ky. (4 Dana) 598, 29 Am. Dec. 431.

The execution and delivery of the sheriff's deed (and, if necessary, a writ of assistance) were the only steps left to be taken following the order of confirmation; they were the only things to be done which there would be any object in staying or superseding—for it is the deed which vests the legal title in the purchaser, and once the purchaser obtains a valid legal title he would become immediately entitled also to possession.

What, then, is the effect of this sheriff's deed issued in violation of the stay and supersedeas?

The Statutes of Oklahoma providing for a sheriff's deed (Okla. Stat. 1931, Sections 456, 457, *supra*) were adopted at Statehood from the Statutes of Kansas, Sections 4556, 4557, then in effect, as is shown by the history in the Statutes of 1931; and with them were adopted the interpretation of those statutes as theretofore made by the Supreme Court of Kansas.

—*Harness* v. *Myers*, 143 Okla. 147, 288 Pac. 285;
Thompson v. *Smith*, 102 Okla. 150, 227 Pac. 77;
Byrd v. *State*, 99 Okla. 165, 226 Pac. 362;
Henrietta Min., etc., Co. v. *Gardner*, 19 Sup. Ct. 327, 173 U. S. 123, 43 L. ed. 637;
Willis v. *Eastern Trust, etc., Co.*, 18 Sup. Ct. 347, 169 U. S. 295, 42 L. ed. 752;
Whitney v. *Fox*, 17 Sup. Ct. 713, 166 U. S. 637, 41 L. ed. 1145.

It was held by the Supreme Court of Kansas, on July 5, 1883, prior to the adoption of the above mentioned statutes by Oklahoma from Kansas, in *Board of Regents* v. *Linscott*, 30 Kan. 240, 1 Pac. 81, 91, that a sheriff's deed is required in order to vest title to property sold at sheriff's sale on execution.

In *Goldstern* v. *Gavin*, 187 Okla. 338, 102 Pac. (2d) 582, it was held that:

> "When, in the execution case, the court set aside the sale and denied confirmation, title to the property remained in the defendant in that case."

Such is the general law.

In *Ford* v. *Nokomis State Bank*, 135 Wash. 37, 237 Pac. 314, it is held:

"In this state we have consistently held from *Singly* v. *Warren,* 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896, to *Cockran* v. *Cockran,* 114 Wash. 499, 195 Pac. 224, 198 Pac. 270, that a certificate of sale executed by a sheriff does not vest title; * * * a purchaser at a judicial sale * * * cannot be said to hold the title, unless he holds a deed in pursuance of the sale."

To the same effect: *Gray* v. *C. A. Harris & Son,* 200 Wash. 181, 93 Pac. (2d) 385.

And, in *Clark* v. *Strohbeen,* 190 Iowa 989, 181 N. W. 430, 13 A. L. R. 1419:

"A judgment debtor is not divested of title until after the expiration of the time for redemption and not until title is vested in the purchaser by sheriff's deed."

In *Anthony* v. *Janssen,* 183 Cal. 329, 191 Pac. 538, it is said:

"With respect to the sheriff's deed, it is sufficient to say, in anticipation of a new trial, that the sheriff was without lawful power at that time to execute a conveyance of the property. * * * The sheriff's power to convey did not accrue until there had been a failure to redeem within the time fixed. * * * The direction in the decree that the deed should be made immediately after the sale was contrary to the Code, and beyond the power of the court. It was therefore *void.*"

To the same effect:

—*Hall* v. *Yoell,* 45 Cal. 584;
Moore v. *Martin,* 38 Cal. 428;
Bernal v. *Bleim,* 33 Cal. 668;
Gross v. *Fowler,* 21 Cal. 392;
Conner v. *Long,* 63 Iowa 295, 19 N. W. 221;
Gorham v. *Wing,* 10 Mich. 486.

In *In re Worley,* 50 Fed. Supp 611 (D. C. Nebr.), it is said, pp. 612-613:

"But this court's inquiry must be directed to the debtor's rights in, and relation to, the farm on the day when she instituted this action. And upon these elements certain decisions of the Supreme Court of Nebraska are instructive. They have to do with the effect of supersedeas, the persistence of the right to redeem, and the status of the title to and the right of possession of foreclosed Nebraska real estate prior to the execution of sheriff's deed.

"In a leading case it was held in 1879 that 'where a proper supersedeas bond is filed and approved' after an order of confirmation of sheriff's sale in foreclosure in which a judgment for deficiency is awarded, 'no execution can issue on the judgment until the bond is set aside, modified, or appellant fails to perfect his appeal.' The suspension for every purpose of the decree of confirmation was asserted. (Citing cases.) Therefore, the filing and approval of the debtor's supersedeas bond in the foreclosure action in the state court effectively intercepted the execution of a sheriff's deed to the purchasing secured creditor until the lapse of the statutory period for the lodging of the appeal in the Supreme Court of the state."

See, also:

—*Philadelphia Mtg. & Tr. Co.* v. *Gustus*, 55 Nebr. 435;
Westerfield v. *South Omaha Loan & Bldg. Co.*, 80 Nebr. 806, 115 N. W. 305;
McCourt v. *Singers-Bigger*, 159 Fed. 102;
Draper v. *Davis*, 102 U. S. (12 Otto) 370, 26 L. ed. 121.

And, as further illustrating the contention that it is the law of Oklahoma that a valid sheriff's deed cannot issue pending appeal from an order confirming sale, is the applicable language in *Brauns* v. *Donahoe*, 127 Okla. 33, 259 Pac. 541, 542:

"It will be observed that this appeal is not from the personal judgment rendered against the defendant below, plaintiff in error here, but is only from the order and judgment of the court confirming sheriff's sale of land; that the supersedeas bond is given to stay the judgment confirming the sale and is conditioned to pay any damages and costs assessed against appellant by virtue of her appeal. The plaintiff, defendant in error, would be entitled to recover on the bond only such damages as he may have suffered *by reason of delay in obtaining sheriff's deed* and stay of judgment confirming sale, including costs of appeal, * * *."

And in *Johnston* v. *Johnston,* 104 Okla. 131, 230 Pac. 700, plaintiff was in possession prior to and at the time judgment was rendered against her in favor of the defendant, and was still in possession at the time her supersedeas bond was executed and approved for the appeal from the judgment. After the appeal was perfected, including the supersedeas bond, defendant obtained an order from the district court rescinding its order placing plaintiff in possession, declaring the stay bond insufficient, and ordering a writ of possession in favor of defendant. The Court says:

"The plaintiff contends that the order of the district court, April 8, 1918, was a *void* order and not competent, and we think this contention must be sustained. Section 794, C. S. 1921; *In re Epley,* 10 Okla. 631, 64 Pac. 18; *Egbert* v. *Ry. Co.,* 50 Okla. 623, 151 Pac. 228; *Short* v. *Chaney,* 66 Okla. 258, 168 Pac. 425.

"Defendant says this order was not subject to objection on collateral attack, but this Court thinks that, since it was a void order and made without jurisdiction, it was subject to attack in any proceeding. *Lee* v. *Tonsor et al.,* 62 Okla. 14, 161 Pac. 804; *Roth et al.* v. *Union Nat'l Bank of Bartlesville et al.,* 58 Okla. 604, 160 Pac. 505; *Choi* v. *Turk,* 55 Okla. 499, 154 Pac. 1000.

"The defendant was allowed to introduce it, but it is not available as a defense, because there is no authority for it, and it is against both the letter and the spirit of the provisions for appeals.

"* * * The judgment of the court as affirmed in Case No. 10125, *Virginia Johnson* v. *E. B. Johnston et al.*, 82 Okla. 259, 200 Pac. 204, held that the defendant, E. B. Johnston, was the owner and entitled to the possession of the premises, but in the appeal by virtue of the supersedeas bond the plaintiff, Virginia Johnson, had the right to the possession until the appeal was passed on and mandate filed in the trial court."

And in *Frensley* v. *Frensley*, 173 Okla. 321, 49 Pac. (2d) 731, it is said:

"Upon an appeal which stays proceedings, the subject-matter involved is removed from the jurisdiction of the lower court until the appeal has been determined."

The Supreme Court of Oklahoma did eventually hand down its decision that the order confirming sale here involved was correct and should be affirmed; but, until that time that it was "passed on by the Supreme Court and mandate filed" petitioners, under the order of court staying further execution and granting supersedeas, were entitled to retain the legal title to their home, and the sheriff was without power or authority to execute and deliver the deed, and the deed was therefore void and conveyed no title whatsoever. Being invalid when issued, it is not made valid by any subsequent affirmance of the order of confirmation.

No other deed has ever been issued. It was under that void deed that the officers acted in executing the writ of assistance. Petitioners therefore, even until now, still own

the legal title to said property, and have been at all times entitled to remain in possession thereof until such time, if ever, as a valid sheriff's deed is executed and delivered.

Thus petitioners have been deprived of their property without due process of law.

II.

The Writ of Assistance Was Void Because Issued By a Court Without Jurisdiction

In *Egbert* v. *St. Louis & S. F. R. Co.*, 50 Okla. 623, 151 Pac. 228, the Court held:

> "A 'mandate' is the official mode of communicating the judgment of the appellate court to the lower court.
>
> "If, before a mandate of the Supreme Court has regularly reached the trial court and been spread upon its record, the trial court makes an order allowing the petition to be amended, and the amendment is made accordingly, the order of the trial court and the amendment are null and void, and the petition stands as if no amendment had been made thereto, although the cause in the Supreme Court has been decided, and written opinion filed, prior to the time of making such order and amendment."

To the same effect:

—*Dooley* v. *Foreman*, 94 Okla. 166, 221 Pac. 47;
Board of Com'rs v. *Baxter*, 113 Okla. 280, 241 Pac. 752;
American Inv. Co. v. *Wadlington*, 122 Okla. 56, 250 Pac. 802.

And it is further held in the *Egbert case, supra*, that:

> "It is a general proposition of law that no two courts have jurisdiction of the same cause of action at the same time."

On June 13, 1941, a purported mandate from the Supreme Court of Oklahoma (R. 132, 354) issued in the name of Wayne W. Bayless, Chief Justice, whereas Earl Welch was Chief Justice beginning January 13, 1941, to January 11, 1943 (R. 133, 355), and which mandate bore date of "this 12th day of *June* ——" without giving any year, was filed in the District Court of Tulsa County, Oklahoma. On July 21, 1941, the alias writ of assistance upon which petitioners were dispossessed was issued by the Clerk of the District Court of Tulsa County (R. 157, 376).

On July 24, 1941, prior to any execution on the writ of assistance, petitioners filed in the Supreme Court of the State of Oklahoma, their Petition to Recall Mandate and Grant a Rehearing (R. 134, 356). This was filed with leave of that Court endorsed thereon (R. 356): "Leave granted to file this 24th day of July, 1941. Fletcher Riley, Acting Chief Justice."

Mrs. Bertha Florence Sabin, one of the petitioners, testified (R. 147, 179, 180) that at the time leave was granted to file the petition just referred to, Mr. O. K. Wetzel, an attorney and one of the respondents herein, was present representing the H. O. L. C. Mrs. Sabin further offered to testify (R. 236) that on July 25, 1941, she served on A. Garland Marrs, Sheriff of Tulsa County, a written notice (R. 236, 379) notifying him of the filing of said petition to recall mandate and for rehearing in the Supreme Court with leave of that Court and that the purported writ of assistance held by him was thereby vitiated; and a copy

of the notice, with affidavit of service attached, was offered in evidence (R. 236) and refused. It is claimed by the sheriff and his deputies that they are protected by the writ, whether void or not. We do not here care to go into that issue, since the writ was issued upon the written application of the H. O. L. C. (R. 239, 384), signed by its attorney, by the same O. K. Wetzel who was present in person when leave was granted by the Supreme Court of Oklahoma to file the petition mentioned. Certainly, therefore, the H. O. L. C. is charged with knowledge that they had no right to thereafter proceed to enforce such writ, if such be the law as we shall endeavor now to show.

Can two courts have jurisdiction of the same cause at the same time? In *Egbert* v. *St. Louis & S. F. R. Co., supra,* it is held they cannot. And such is the general rule of law:

—*Ott* v. *Boring,* 131 Wis. 472, 110 N. W. 825, 111 N. W. 833, 11 Ann. Cas. 857;

Thomas v. *Thomas,* 27 Okla. 801, 109 Pac. 825, 113 Pac. 1058;

Western Wheel-Scraper Co. v. *Drinnen* (D. C. Ill.), 79 Fed. 820;

Blake v. *Miller,* 118 Ill. 500, 8 N. E. 828;

Ladd et al. v. *Couzins,* 35 Mo. 513;

Baggs v. *Smith,* 53 Cal. 88;

Shay v. *Chicago Clock Co.,* 111 Cal. 549, 44 Pac. 237;

Baker v. *Borello,* 131 Cal. 615, 63 Pac. 914;

In re Bullard's Estate, 3 Cal. Unrep. 688, 31 Pac. 1119;

Keyser v. *Farr,* 105 U. S. 265, 26 L. ed. 1025.

The Supreme Court of Oklahoma has held that it has the *power*, even after term, to recall a mandate and grant a rehearing:

—*Brann* v. *Harris*, 173 Okla. 167, 47 Pac. (2d) 876;
Simmons v. *Harris*, 108 Okla. 189, 235 Pac. 508;
Henderson v. *Pebworth*, 107 Okla. 238, 232 Pac. 74;
Thompson v. *Nickle*, 113 Okla. 44, 239 Pac. 649;
McKee v. *Thornton*, 81 Okla. 261, 198 Pac. 303;
St. Paul Fire & Marine Ins. Co. v. *Peck*, 40 Okla. 396, 139 Pac. 117.

And while it says in several cases that this ordinarily will not be done in the absence of fraud, accident, or inadvertance, it did, in at least one case, recall a mandate, grant a rehearing, and render an opinion directly contrary to its original opinion because the Court itself had based its first opinion upon a misapprehension of the law. This was in *Ehrig* v. *Adams*, 67 Okla. 157, 169 Pac. 645, wherein the Court says:

> "Our attention has not been called to any limitation in the Constitution or statutes of this State upon the power of this Court to recall its mandate.
>
> "In the case of *Thomsen et al.* v. *Cayser et al.*, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. ed. 597, Ann. Cas. 1917D, 322, in an opinion filed March 6, 1917, the Supreme Court of the United States in overruling a motion to dismiss, based upon the action of the Circuit Court of Appeals in recalling its mandate after judgment had been entered in the lower court and the term had expired, said:
>
> " 'A writ of error from the federal Supreme Court to review a judgment of reversal with instructions to dismiss the complaint which a Circuit Court of Appeals had entered on rehearing after it had recalled its mandate, previously issued, ordering a new trial, and had set aside the judgment of the court below,

need not be dismissed, either because the trial court had theretofore entered judgment on the original mandate, and had adjourned for the term without any application made to recall such judgment, or any writ of error to review such judgment sought.'

"To the same effect is the case of *Franklin Bank Note Co.* v. *Mackey*, 158 N. Y. 683, 51 N. E. 178, where a motion was made to vacate an order recalling the mandate after the same had been filed and judgment entered thereon in the lower court. In that case the Court of Appeals said:

" 'It is often erroneously assumed that after the filing of the remittitur in the court below, and order entered thereon, this court is deprived of all jurisdiction in the cause. In *Sweet* v. *Mowry*, 138 N. Y. 650, 34 N. E. 388, a motion for reargument was granted and a return of the remittitur requested. These acts of the court were held to be a resumption of jurisdiction. * * * It is competent for this court to determine whether it will resume jurisdiction for any purpose, and, having decided to do so, it then requests the court below to return the remittitur.' "

It is true in this case the Supreme Court of Oklahoma did not ever order the mandate recalled, but they did, as stated, grant leave to petitioners to file a petition in that Court to recall the mandate and to grant a rehearing; and the Supreme Court did consider that petition, and did not pass on the question of whether it would be granted until September 5, 1941 (R. 288, 385).

In the meantime, after that petition was filed, but before it was passed on, the writ of assistance was executed in the lower court.

On September 5, 1941, the petition was denied by the Supreme Court. But what if it had been allowed, and the

mandate then been ordered recalled? We have shown that the Court had power to do that. The lower Court would then have had to back up, recall its writ of assistance, put petitioners back into possession of their property, and put the matter back in *statu quo* as it was on July 24, 1941; else any subsequent action of the Supreme Court could not be effective. This is one of the reasons no two courts can have jurisdiction of the same cause at the same time.

As to the effect of the Supreme Court of Oklahoma granting permission to petitioners to file the petition mentioned, we find it held by this Court, in *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164, 63 L. ed. 534, 39 Sup. Ct. 213, that:

> "• • • whatever its form of finality, if a judgment be in fact *subject to reconsideration* and review by the state court of last resort through the medium of a petition for rehearing, and such petition is presented to and *entertained and considered* by that court, we must take it that, by the practice prevailing in the state, the litigation is not *brought to a conclusion* until this petition is disposed of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the Act of Congress. We said recently in an analogous case: 'If it were not so, a judgment of state court, susceptible of being reviewed by this court, would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse.' *Andrews* v. *Virginian R. Co.*, decided January 7, 1919 (248 U. S. 272, ante 236, 39 Sup. Ct. Rep. 101)."

This case was followed by the Circuit Court of Appeals for the Ninth Circuit, in *Warren* v. *Terr. of Hawaii*, 119 Fed. (2d) 936, wherein it is said:

"Appellee contends the appeal was taken too late and that we have no jurisdiction to consider it. The appeal here was not taken within the three months from the entry of the Hawaiian Supreme Court's judgment. There was a petition before that Court filed within the time under a Court rule giving an unconditional right to file it within 20 days after the filing of the Court's opinion. There was also a Court rule requiring the issue of the mandate forthwith on the decision of a criminal case. The mandate was issued before the petition was filed. The Court had the power to recall it, on its own motion or that of the losing party. *It was not recalled.* The Court in dismissing the petition stated, 'Although without jurisdiction to pass upon the merits of the motion for rehearing, we have carefully examined it and entertain no doubt that were it properly before us for consideration we would be compelled to deny the petition for lack of merit.' * * * Since the Court had *power* to recall the mandate, we regard its admitted consideration of the merits an *entertainment* within the rules of *Chicago, Great Western Ry. Co.* v. *Basham*, 249 U. S. 164 (and other cases cited), and hence have given the merits the above consideration."

This last case presents almost the same situation as this case: The Supreme Court of Oklahoma had the power to recall its mandate; it did not recall it; but it did entertain a petition for rehearing. We submit that this amounted to such a re-assumption of jurisdiction of the case as to deprive the lower court and its officers to act further while it was thus being considered and entertained by the appellate court.

The Circuit Court of Appeals in this case, while recognizing the power of the Supreme Court of Oklahoma to recall its mandate here involved, refused to follow the decision of this Court in the *Chicago, G. W. R. Co. case, supra*, and its

decision is in direct conflict with the decision of the Ninth Circuit in the *Warren case, supra,* and although its attention was called to both these cases in the briefs, no mention is made of them in its opinion, the Court being content with merely saying that "The granting of leave to file the petition did not effectuate a re-assumption of jurisdiction of the cause" (R. 405), without citing any authority for this conclusion.

Attention is called to the fact that petitioners here filed a petition for *certiorari* in this Court to be directed to the Supreme Court of Oklahoma following the denial of the aforesaid petition to recall mandate and grant a rehearing, in Case No. 767, October Term, 1940. This they had a right to do, as is stated in *Brann* v. *Harris, supra,* and, as is further stated in that case:

> "The trial court had no right to proceed as if the case were closed while it was still pending in this Court and in the Supreme Court of the United States.
>
> "If the trial court in thereafter proceeding was in the position of passing upon the right of this Court to recall the mandate, that matter could not be properly considered or passed upon by the trial court. *Stanley, County Treasurer* v. *School District No. 4 of Marshall County,* 142 Okla. 240, 286 Pac. 340."

We submit that the writ of assistance became vitiated by the act of the Supreme Court in re-assuming jurisdiction of the case, and that the H. O. L. C. could not lawfully permit the sheriff to proceed thereunder until after the Supreme Court of Oklahoma had passed upon the petition to recall mandate, and, after that, not until this Court had passed

upon the petition for writ of *certiorari* on February 2, 1942. (*Sabin* v. *H. O. L. C.*, No. 786, Mem. 315 U. S. 800, 62 Sup. Ct. 625, 86 L. ed. 1201.)

Furthermore, following the filing of the order of this Court denying *certiorari* in the Supreme Court of Oklahoma, it is shown by the exhibit of a copy of the docket of that Court (R. 135, 373) that no further action has ever been taken by that Court to again transfer jurisdiction of the matter to the State District Court. We submit, therefore, that jurisdiction of the case still rests at this time in the Supreme Court of Oklahoma.

CONCLUSION

In conclusion, your petitioners respectfully submit that the final determination by this Court of the questions of law involved in this case is of the utmost importance to the rights of the innumerable persons against whom mortgages are being foreclosed every day; that the decision of the Circuit Court of Appeals herein is not only contrary to the law, as announced by this Court in its earlier decisions, but is contrary to the law announced by other Circuit Courts as well as probably contrary to the decisions of the local State courts of Oklahoma; and unless the errors in that decision are corrected by this Court, the effect will be to create regrettable confusion regarding questions of law which are of the utmost importance in every mortgage foreclosure case, which cases are large in number and involve

large amounts of money. And it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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